Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

II. No other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and no sexual conduct, did the government introduce sufficient proof of *scienter* to support a guilty verdict?

III. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, is an objectively reasonable good faith belief that the videotapes did not depict "sexually explicit conduct" a valid affirmative defense?

IV. Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

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OPINIONS BELOW

This Court granted certiorari in this case on June 7, 1993,[1] but remanded the case back to the Third Circuit on November 1, 1993, for reconsideration "in light of the position asserted by the Solicitor General in his brief for the United States". The Supreme Court's order remanding the case is reported in *Knox v. United States*, ___ U.S. ___, 114 S.Ct. 375, 126 L.Ed.2d 325 (1993). The opinion of the Court of Appeals for the Third Circuit on remand is reported in *United States v. Knox*, ___ F.3d ___ (3d Cir. 1994), 1993 WL 664475, and is reproduced in the Appendix to this petition, PA 1-52. The previous opinion of the Court of Appeals for the Third Circuit is reported at 977 F.2d 815 (3d Cir. 1992). The opinion of the district court denying Knox's pretrial motion is reported at 776 F.Supp. 174 (M.D. Penn. 1991).

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on June 9, 1994, re-affirming Petitioner Stephen Knox's conviction for receipt and possession of child pornography as proscribed by 18 U.S.C. § 2252 *et seq.* This petition for a writ of certiorari was filed within ninety (90) days of judgment by the Third Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 2252(a)(2)[2] and (a)(4)(B) provide in pertinent part:

> (a) Any person who –
>
> (2) knowingly receives . . . any visual depiction that has been mailed, or has been shipped or

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[1] 113 S.Ct. 2926, 124 L.Ed.2d 677 (1993).

[2] This statute was recently held to be unconstitutional on its face. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), *cert. granted*, 114 S.Ct. 1185 (1994).

transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means . . . , if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(4) either –

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct:

shall be punished as provided in subsection (b) of this section.

Title 18, United States Code, § 2256(2) provides in pertinent part:

For the purposes of this chapter, the term –

(2) "sexually explicit conduct" means actual or simulated –

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Stephen Knox was convicted on one count of receiving depictions of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(2) and § 2256(2)(E) and one count of possessing three or more items containing a depiction of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(4)(B) and § 2256(2)(E), based solely on three videotapes containing videotaped sequences sold by a Nevada-based company, Nather, Inc. ("Nather").

Although none of the minors depicted in the videotapes were shown to be engaged in any actual or simulated sexual conduct as proscribed by 18 U.S.C. § 2256(2)(A), (B), (C), or (D), and all genitals were fully covered, the district court agreed to decide – and then denied – a pretrial motion to dismiss based upon the contents of the videotapes. The underpinning of the district court's denial was a finding that the uppermost portion of the inner thigh was part of the "pubic area". Since the pubic area was exposed (nude), the district court reasoned, a prosecution based on an exhibition of the pubic area, rather than the genitals, was statutorily authorized:

> Although in every instance the girl's genitals were covered by either underpants or a bathing suit, the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed.

United States v. Knox, 776 F.Supp. 174, 180 (M.D. Penn. 1991).

At a subsequent bench trial, the trial judge found that the "exhibitions" were "lascivious" and had been received by Knox in the mail. Knox was convicted and, on February 13, 1992, sentenced to the mandatory minimum sentence of five (5) years imprisonment. On October 15, 1992, the Third Circuit Court of Appeals found the district court in error because "[d]isplaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)", *United States v. Knox*, 977 F.2d 815, 819-820

(3d Cir. 1992). However, the Third Circuit affirmed Knox's conviction, holding that 18 U.S.C. § 2256(2)(E) included within its scope depictions of minors whose genitals and pubic areas are fully covered by clothing.

After this Court granted a writ of certiorari and Stephen Knox filed his main brief on the merits, the Solicitor General conceded that the Third Circuit "erred in holding that simply focusing on the midsection of a clothed body may constitute an 'exhibition' of the unrevealed body parts beneath the garments." (GRb 10).[3]

The Solicitor General further informed this Court that the legislative history of the statute demonstrated that the statute had been clarified

> in order more clearly to delineate 'what *types of nude portrayals* of children were intended to be encompassed within this definition.'

(Emphasis in the Government's Brief.) (GRb 11).

The government, *sua sponte*, conceded a second error by the Third Circuit in statutory construction, arguing that the statute criminalizes depictions "only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas. *See, e.g., New York v. Ferber*, 458 U.S. 747, 764 (1982)."[4] (GRb 13).

On November 1, 1993, following the filing of the Government's brief, this Court remanded the case to the Third Circuit. On June 9, 1994, the Third Circuit filed its opinion re-affirming Petitioner Stephen Knox's conviction, again holding that 18 U.S.C. § 2256(2)(E) included within its scope depictions of minors whose genitals and pubic areas are fully covered by clothing.

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[3] The Government's Supreme Court Responding Brief is referred to as "GRb".

[4] Petitioner agrees with this position.

B. STATEMENT OF FACTS

1. The Defendant

Petitioner Stephen Knox was, until 1994, an honors graduate student working on his doctorate in history at Pennsylvania State University, where he maintained a 4.0 average. (A 81).[5] In 1986, he graduated summa cum laude with a bachelors degree from Temple University. (A 80). According to Dr. Nan Elizabeth Woodruff, Knox "easily ranks among [the] top five graduate students" at Penn State. (A 82). Similarly, Professor William A. Blair found Knox to have "enriched the graduate community at Penn State" and to have taken substantial initiative in gaining a mastery of his subject matter. Pending the outcome of this case, Knox is working as a printer in Philadelphia.

Although Knox was previously convicted for receiving "child pornography" sold to him by a government sting operation, he has obeyed the terms of his probation, and has been successfully discharged from required therapy sessions. Relying heavily on the psychological evaluation of Dr. Fred Covan, Chief Psychologist at Bellevue Hospital in New York (A 84 to 88), the trial judge concluded that there is "*absolutely no evidence of any inclination by the defendant of untoward conduct toward anyone else*" and granted Knox bail pending appeal. (Emphasis added.) (ST 28 to 29).[6]

2. The Videotapes

Each of the three two-hour-long videotapes[7] seized from Stephen Knox's home consists of up to several dozen

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[5] "A" refers to the Appendix previously filed with the Court.

[6] Three transcripts comprise the entire record in this case. Testimony and argument on the motions on August 28, 1991, are contained in the motion transcript, or "MT". The November 14, 1991, trial has the usual designation of "T". Sentencing and argument on the post-trial motions on February 13, 1992, are contained in the sentencing transcript, or "ST".

[7] The three videotapes and the boxes containing Knox's handwritten notations were marked into evidence and made part of the record as Government Exhibits 5, 6, and 7, respectively. (MT 60).

sequences from a few to fifteen minutes in length. The sequences are "dubs" from videotapes sold by Nather, as evidenced by Knox's hand-written notations on each of the videotape boxes reflecting numerous titles advertised in the Nather brochures, and as demonstrated by the fact that the length of each videotape sold by Nather is considerably less than two hours.[8]

Shown in the videotape sequences are apparently amateur models in poses no different from what one would commonly find in fashion magazines[9] or see on television, in gymnastics meets, on *Star Search* or *America's Funniest Home Videos*. There are also depictions of children horsing around, sitting in parks, and swinging on swings. The children's costumes and leotards, short shorts and skimpy bathing suits (worn by the older teenage models), frilly socks, or biker shorts with lace trim, are wholly appropriate to the ages of the minors wearing them.

Except for one sequence (discussed below), no girls depicted in the videotapes are engaging in conduct which is not commonly portrayed in popular motion pictures, family albums, on the pages of fashion and photography magazines, and on television.[10] None of the models were engaged in any overtly sexual behavior; rather, any sexuality is implied, either by the natural or feigned sensuality of the models, or by the videographer's occasional "zooming in" on the girls' uncovered legs and the clothing covering the genitals, buttocks, and breasts. In reality, the minors in the tapes are doing nothing which anyone observing them from a few feet away would consider "lascivious" or overtly sexual. It cannot be

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[8] *See* the Nather brochures marked into evidence as GX-1 and made part of the record. (T 9).

[9] Fashion magazines, such as *Vogue* and *Seventeen*, routinely feature teenaged girls "alluringly" posed in order to sell a variety of clothing and other products.

[10] Even the behavior in the sequence discussed below does not constitute "sexually explicit conduct" under 18 U.S.C. § 2256(2)(E).

seriously argued that any of the behavior on the part of the children depicted "simulates" sexual conduct of any type.

The only sequence in the videotapes in which a girl intentionally opens her legs to show her panties is an excerpt from the French movie, *Le Grande Chemin* (The Grand Highway - 1988), a general release (not an "adult") movie which had a successful run at foreign film houses throughout the United States, is available for home viewing on videocassette at most major video outlets, and was presented on *Bravo* (a national cable network) on various dates, including January 24, 1994.[11]

There is no question but that the 11-year-old girl in *Le Grande Chemin* was directed to spread her legs in order to show her panties – as witnessed by the dialogue, translated in the subtitles which flash across the screen (and reported here verbatim):

> *Dirty boy! Why do you always stare at my pants?*
>
> I don't. You keep showing them.
>
> *Liar! I saw you when I was in the tree! Admit it, you're curious! You've never seen a girl's wee wee, I bet!*
>
> Yes I have.
>
> *I bet you haven't! Want me to show you?*
>
> Yours? Are you kidding?
>
> *Come and see! Free of charge! Promise not to tell a soul!*

The fact that this sequence was excerpted from a popular film underscores both the vagueness and overbreadth problems which arise from an expansive interpretation of 18 U.S.C. § 2256(2)(E).

3. The Pretrial Motion

The district court granted a pretrial hearing on the issue of whether the three videotapes could be found to depict

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[11] The sequence is contained on the videotape marked *Nather #2*, made part of the record during the pre-trial hearing as Government's Exhibit 6. (MT 60).

minors engaging in "sexually explicit conduct" under the statute, despite the fact that the minors' genitals were completely covered by clothing. Because the defendant waived his right to a jury trial, the court agreed to rule upon an issue usually reserved for trial. *Knox*, *supra*, 776 F.Supp. at 178-179. The trial court observed that "[t]his is a case of first impression." *Id.* at 180.

The government's theory at trial rested upon an exhibition of the pubic area, rather than the genitals. In denying Knox's pretrial motion, the judge adopted a scientifically incorrect view that the uppermost portion of the inner thigh was part of the "pubic area" and – since the inner thigh was exposed (nude) – found the three videotapes contained "exhibitions" under § 2256(2)(E). The court left for trial its determination of whether that exhibitions were "lascivious". *Knox*, *supra*, 776 F.Supp. at 180.

4. The Bench Trial

At the bench trial on November 14, 1991, all testimony and exhibits on the motions to suppress and dismiss were incorporated for purposes of the trial. (T 3). The government introduced advertisements and a catalog for videotapes from Nather, with an address in Las Vegas, Nevada, as well as preprinted envelopes, found at Knox's apartment, which bore Nather's address and were apparently supplied by Nather to facilitate ordering. A $62 Traveller Express money order to Nather, dated June 4, 1990, (twenty-two (22) months prior to the dates on which the indictment alleged the crime was committed) was also introduced. (T 6 to 7).

The government's sole witness, a Customs agent, testified that Knox had rented a mail box at Mail Box Etc. under the name of J. Richard Scott, several months *after* the money order to Nather was written. (T 7 to 9). On cross-examination, the agent acknowledged that the videotapes seized from Knox's apartment may have been "dubs", i.e., not the original tapes made and distributed in interstate commerce by Nather. (T 11). The agent also acknowledged that he had no evidence

that any materials, legal or illegal, were ever received by the defendant at the mail box. (T 12).

The defense offered into evidence various issues of *Video Magazine*, which contained Nather advertisements (T 15 to 16). The government offered copies of Nather brochures, seized from Knox's apartment, which stated that the tapes were legal because they contained no nudity or sexual conduct. (MT 51). The defense argued in summation that the government had failed to prove the element of mailing, the necessary *mens rea*, and adopted the other arguments previously made at the pretrial hearing. (T 17 to 20).

5. The Verdict And Post-Trial Motion

The court filed a written pleading on November 15, 1991, finding the defendant guilty on each count (without reasons), ordered a pre-sentence investigation, and set sentencing for February 13, 1992, at 1:00 p.m.

Prior to sentencing, Knox filed a motion for verdict of acquittal or, in the alternative, for a hearing to explore further "the relationship of the medical and anatomical authorities to the intent of Congress" (A 51 to 55). The motion was supported by an affidavit of Dr. Todd Olson, Director of Human Gross Anatomy at the Albert Einstein College of Medicine, establishing the indisputable fact that the uppermost portion of the inner thigh is not the pubic area. The trial judge denied the motion (A 58 to 60), and sentenced Stephen Knox to the minimum mandatory five (5) year term. (ST 22 to 24).

REASONS FOR GRANTING THE PETITION

A writ of certiorari was previously granted in this case to resolve precisely the same issues raised in this Petition. After this Court remanded the case in light of the government's concession that the Third Circuit had erred in its reading of the statute, the Third Circuit again refused to acknowledge what the government had been forced to concede: that the express language of 18 U.S.C. § 2256(2)(E) does not criminalize depictions of minors whose genitals and pubic areas

are completely covered, and that the legislative history corroborates the view that Congress intended to limit "what types of *nude* portrayals of children were intended to be encompassed" under the law. Congress did not intend to expand the definition to include depictions in which genitals and pubic areas were fully covered.

The fact remains that Petitioner Stephen Knox is the only person ever to be convicted for receiving and possessing depictions of minors whose genitals and pubic areas are fully covered and who are not otherwise engaged in sexual activity.

The Third Circuit's expansion of the child pornography statute will unquestionably have a chilling effect upon legitimate publishers and contravenes the limitations on "child pornography" laws set forth in the Supreme Court's decision in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Worse, the government will have an unlimited charging power. Depictions of minors in bathing suits, leotards, shorts, underwear, and similar clothing are created every day and may be found throughout society. The Third Circuit's decision places all such depictions into a "grey area" where a decision to prosecute rests, in part, on the government's subjective view of the potential defendant. Given the substantial First Amendment rights at stake, the serious penalties faced by defendants convicted of child pornography crimes, and the enormous social stigma attached to those even accused of the crime, the Third Circuit's interpretation cannot constitutionally stand.

The Third Circuit stubbornly adhered to its previous decision, despite the fact that no authority supports it. Where before the Third Circuit claimed the legislative history supported its expansive reading, the Third Circuit has now admitted:

> we conclude that it is wholly silent as to whether Congress intended the statutory term 'lascivious exhibition of the genitals or pubic area' to encompass non-nude depictions of these body parts.

PA 26.

Similarly, where before the Third Circuit found clear support for its expansive reading of the statute in *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.*

United States v. Wiegand, 812 F.2d 1239 (9th Cir.), *cert. den.*, 484 U.S. 856, 108 S.Ct. 164 (1987), it has now argued

> although the fourth *Dost* factor arguably provides no support for our interpretation of the statute as reaching lascivious depictions of a child's fully covered genitals or pubic area, it is clearly not inconsistent with that interpretation.

PA 32-33.

Finally, the Third Circuit again ignored the venerable Rule of Lenity applicable to criminal statutes. Knox stands convicted of conduct neither he nor anyone else could possibly have known was criminal. In finding Knox guilty of "knowingly" receiving and possessing "child pornography", the Third Circuit has held Knox to a standard of *scienter* which is inapplicable to the facts of his case and in conflict with an analogous decision of the Court of Appeals in *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992).

A. There Can Be No "Exhibition Of The Genitals Or Pubic Area" Under 18 U.S.C. § 2256(2)(E) Where The Genitals And Pubic Area Are Fully Covered By Clothing.

The depictions of minors contained on the Nather tapes clearly fall outside the "hard core of child pornography" at which the federal law is directed. *New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363. It is not open to dispute that the videotapes in *Knox* did not depict "sexually explicit conduct" as defined in 18 U.S.C. §§ 2256(2)(A) through (D). Neither is there any depiction of nudity, even in part, of the genitals or pubic area of any person. As both the District Court and Third Circuit decisions emphasize, in every instance in the Nather tapes, the minors' genitals are fully and opaquely covered by an article of clothing.

1. The "Plain Meaning" Of The Statute Proves Nudity Is Required Under The Statute.

18 U.S.C. § 2256(2) defines "sexually explicit conduct" to include a "lascivious exhibition of the genitals or pubic

area of any person". In the responding brief filed in this Court by the Solicitor General on September 17, 1993, the government agreed with the defendant that the plain meaning of the statute does not encompass depictions of minors whose genitals and pubic areas are fully covered by clothing:

> We believe that . . . the [Third Circuit] erred in holding that simply focusing on the midsection of the clothed body may constitute an 'exhibition' of the unrevealed body parts beneath the garments.
>
> The most natural meaning of [the] term ['lascivious exhibition of the genitals or pubic area'] is that one of those parts of the body – rather than the clothing covering them – must be 'on exhibit'.

GRb 10-11.

Nowhere in its decision on remand did the Third Circuit deal with this critical concession by the government that the theory on which the Petitioner was convicted – that there can be an "exhibition" where the genitals and pubic area are fully covered – is incorrect.

Clearly, if the word "exhibition" has any meaning at all in the statute, it is that the object being "exhibited" must actually be seen. "Exhibition" means "an exhibiting, showing or presenting to view", and "exhibit" means "to offer or *expose to view*; present for inspection". (Emphasis added.) *Random House Dictionary of the English Language* (Unabridged), 1979. "Expose" means "to uncover or bare to the air, cold, etc.; to present to view, exhibit, display", and "view" means "to see, behold". *Id.* The sole antonym listed in the *Random House Dictionary* for "exhibit" is "conceal", a word which means "to *cover* or keep from sight". *Id.* (Emphasis added.) From these definitions, the conclusion is inescapable that the statute proscribes only depictions in which genitals or pubic areas are exposed to view, uncovered, or bared to the air. Genitals which are concealed – that is, fully covered by clothing – cannot, by definition, be exhibited. Thus, a finding that § 2256(2)(E) criminalizes "exhibitions" of the genitals or pubic areas "even when these areas are covered by an article of clothing", is quite literally a

contradiction in terms. *United States v. Knox, supra*, 977 F.2d at 825.

If the plain meaning of the word "exhibition", rather than an admittedly "expansive" interpretation,[12] is adopted, the conclusion is mandated that some exposure of the genitals or pubic area – that is, full or partial nudity – is a prerequisite for an exhibition. On remand, the Third Circuit reasoned that the Nather videos contain "exhibitions" of the genitals or pubic areas because

> Although the genitals are covered, the display and focus on the young girls' genitals and pubic areas apparently still provides considerable interest and excitement for the pedophile observer. . . . *Thus, the scantily clad genitals or pubic area of young girls can be 'exhibited' in the ordinary sense of the word.* . . .

PA 21. (Emphasis added.)

Where the genitals are fully covered, however, they cannot be "exhibited" because no part of the genitals – consisting of the labia majora, labia menora, clitoris, and vagina – can be seen.[13] Neither are the child's genitals exposed to view simply because the viewer is aroused by the depictions.[14] The question is not whether someone might be aroused by fantasies or thoughts of what lies beneath the clothing, but whether the minor is depicted engaging in "sexually explicit conduct" as defined by the statute.

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[12] *See United States v. Knox, supra*, 977 F.2d at 823.

[13] This is so even where a contour or silhouette of the genitals is visible beneath the clothing.

[14] Following this reasoning, almost any image of a child could be criminalized, since it is certain that some people sexually attracted to minors do not require for their arousal that the minors be dressed in bathing suits, leotards, or short skirts. Kenneth Lanning, Supervisory Special Agent for the Behavioral Science Unit of the FBI, labels as "child erotica" all depictions of children which do not run afoul of the law if possessed by a "pedophile", precisely because "pedophiles" may find such depictions erotically arousing or attractive. *See* Lanning, K., *Child Molesters: A Behavioral Analysis for Law Enforcement Officers Investigating Cases of Child Sexual Exploitation.* Washington, D.C.: National Center for Missing & Exploited Children, 1987, pp. 19-20.

Since no minor is exposing her genitals or pubic areas, the Nather tapes are not prohibited under the statute.

2. The Legislative History Proves Nudity Is Required Under The Statute.

As the government was forced to concede in its Responding Brief to this Court,

> the phrase 'lascivious exhibition of the genitals or pubic area' entered the statute . . . as a replacement for an earlier draft provision that would have prohibited depictions of child 'nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.' S. 1011, 95th Cong., 2d Sess. (1977). Objection was made to this language on the ground that it was excessively vague. The phrase 'lewd exhibition of the genitals or pubic area' was substituted at the suggestion of the Department of Justice. That change was made in order more clearly to delineate 'what *types of nude portrayals* of children were intended to be encompassed within this definition'.

GRb 11. (Emphasis added.)

The Third Circuit's conclusion was incongruous with the government's accurate analysis:

> After further examining the relevant legislative history, however, we conclude that it is wholly silent as to whether Congress intended the statutory term 'lascivious exhibition of the genitals or pubic area' to encompass non-nude depictions of these body parts.

PA 26.

In substituting the phrase "lewd exhibition of the genitals" for the "nudity" provision, Congress obviously intended to criminalize only depictions of children whose genitals or pubic areas were nude *and* who were engaged in exhibiting their genitals or pubic areas in a "lewd" (now "lascivious")

manner. The legislative history of 18 U.S.C. § 2252 *et seq.* is replete with examples supporting this reading of the statute embraced both by the government and Petitioner Stephen Knox.

The Third Circuit's claim that there is an equally plausible alternative reading of the statute is blind to the actual words that comprise the legislative history. Throughout the entire legislative history of the child pornography laws, from the early criticism of the "nudity" provision[15], through the late 1980s, not a single member of Congress or witness testifying before the Congress even *suggested* that depictions of minors who were fully clothed and not otherwise engaged in sexual conduct could or even should be prohibited under the law.[16]

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[15] See, for example, the testimony of Paul Bender, former University of Pennsylvania Professor and a member of the Solicitor General's Office that prepared the government's Responding Brief to this Court, *Protection of Children Against Sexual Exploitation*, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, 95th Congress, First Session, May 27, June 16, 1977, pp. 77-78, and the comments of Congressman Edward I. Koch, *Cong. Rec.* E 3419 (daily ed. June 1, 1977), both criticizing the "nudity" provision.

[16] See, e.g., *Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; A Bill to Amend the Sexual Exploitation of Children Act of 1977: Hearings on S. 2856 before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, 97th Cong., 2d Sess. 111 (1982) (testimony of Robert Pitler, Bureau Chief of New York's District Attorney's Appeals Bureau, who clearly understood the phrase "lewd exhibition of the genitals or pubic area" to require nudity of those body parts); *Child Pornography*, Hearings before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982, pp. 19-20 (testimony of Bruce Rich, on behalf of the Association of American Publishers); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952; *Cong. Rec.*, Senate, October 18, 1986, p. S. 17296 (statement of Senator Roth, speaking in support of H.R. 5560, the "Child Sexual Abuse and Pornography Act of 1986", the House counterpart to S. 2398).

Rather, without exception, discussions regarding "chil pornography" were limited to depictions in which childre were engaged in sexual acts or, at the very least, nude.[1

Together with the Justice Department's 1977 criticism o the "nudity" provision, these discussions conclusively demon strate that the phrase "lascivious exhibition of the genitals was intended to narrow the type of nudity which was to b criminalized.

The Third Circuit attempted to explain its expansiv interpretation of 18 U.S.C. § 2256(2)(E) by focusing on th broad Congressional purpose of the statute.

> The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles.

PA 31.

While it is true that the underlying purpose of the federa child pornography law is to prevent psychological harm t children, there is no evidence anywhere to suggest that a image of a minor whose genitals and pubic area are full

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[17] The testimony of Robert Showers, former Director of the Nationa Obscenity and Child Exploitation Task Force in the Department of Justice (an according to his curriculum vitae, the "primary author of the [Reagan] administra tion's Child Protection and Obscenity Enforcement Act of 1988"), before the Senat Subcommittee on Labor and Human Resources on April 27, 1990, regarding th reauthorization of funding for the National Endowment of the Arts, is instructive i this regard, since it demonstrates that even senior officials in the Department o Justice did not, prior to the *Knox* case, envision that the child pornography law extended beyond depictions in which the genitals or pubic areas were nude:

> While many people have claimed that 'lascivious exhibition of the genitals' is substantially overbroad or vague since it could include an innocent picture of a parent's infant taken while the infant was unclothed, the courts have construed such language as including *only nude photographs of minors* which involve a graphic focus on the genitalia or present the child in a sexually provocative manner, such as constitutes a lewd exhibition.

Prepared Statement of H. Robert Showers, Senate Subcommittee on Labor & Human Resources, 101st Congress, 2d Session, April 27, 1990, reprinted i *Cong.Rec.* pp. 301, 306. (Emphasis added.)

covered could, regardless of where the camera is focused, cause the kind of psychological harm with which Congress and the American public were concerned when the first federal child pornography law was passed in 1977. Indeed, labeling the images on the Nather tapes "child pornography" would appear to trivialize the experiences of those who were or are victimized by involvement in *actual* child pornography.

Neither is there any indication in the legislative history that the statute ever intended to criminalize images simply because they are intended to arouse "pedophiles".[18]

As the court taught in *United States v. Villard*, 700 F.Supp. 803, 812 (D.N.J. 1988), "[p]rivate fantasies are not within the statute's ambit". Thus, a fantasy expressed in picture, however distasteful, is not "child pornography" unless it also depicts a child engaged in "sexually explicit conduct". This is why the government told the Supreme Court that

> [d]epictions therefore come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas.

(GRb 13).

The Third Circuit's incorrect reading of the statute also ignores the legal context of the phrase "lewd exhibition of the genitals", which has always required nudity of the genitals or pubic area. The phrase is, as the Supreme Court noted in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), "not unknown in this area and, indeed, was given in [*United States v.*] *Miller* as an example of a permissible regulation." *New York v. Ferber*, 458 U.S. at 764-5, 102 S.Ct. at 3358-9.

In obscenity law (including prior to the passage of the federal child pornography law), "lewd exhibition of the genitals" refers only to those depictions in which the genitals are

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[18] If this were the case, the Congress would certainly have criminalized a much broader range of images, including, for instance, "lascivious" depictions of minors exposing their breasts or buttocks.

exposed, i.e. uncovered, and the subject is engaging in som sort of sexually explicit display of them. For example, *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2 642 (1974), this Court inquired whether the film, *Carn Knowledge*, contained hard core sexual acts or "lewd exhib tions of the genitals" and found that

> [w]hile the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatsoever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standard.

418 U.S. at 161, 94 S.Ct. at 2755.

Read in light of the meaning of the phrase "lewd exhib tion of the genitals" in obscenity law – i.e., to require nudi of the genitals – it is impossible to conclude that Congre intended, in adopting that phrase, to eliminate a nudi requirement. In fact, since Congress did not explicitly *inclu* within the scope of the statute depictions in which minor genitals and pubic areas are fully covered by clothing, th court cannot now expand the law to encompass such depi tions.

3. Precedent Proves Nudity Is Required Under Th Statute.

Since the first child pornography law was passed in 197 no person other than Stephen Knox has been indicted convicted for receiving or possessing depictions of mino whose genitals and pubic areas are fully covered by clothin Nor has anyone – including the producer and seller of th segments contained on the videotapes in question – bee indicted or convicted for producing such depictions. Althoug the lack of prior prosecutions over a period of over fiftee years is not dispositive, it would certainly appear that th

Third Circuit's interpretation is at odds with the general understanding of the statute on the part of law enforcement officials, prosecutors, and the public at large.

In its initial decision, the sole authority relied upon by the Third Circuit in finding that 18 U.S.C. § 2256(2)(E) criminalizes depictions of minors whose genitals are fully covered by clothing was *United States v. Dost, supra*. According to *Dost*, whether an image depicts a "lascivious exhibition of the genitals or pubic area" is determined by analyzing the image for the presence of a number of factors, including

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting . . . is sexually suggestive, i.e., in a place or pose associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F.Supp. at 832.[19]

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[19] The *Dost* factors, of course, are not part of the statute and have not been universally recognized as the definitive interpretation of it. Nor does Petitioner believe they should be. Moreover, Petitioner regards the sixth *Dost* factor as particularly problematic in light of the legislative history of the statute.

Contrary to the Third Circuit's reading of the case, dep
tions of clothed minors were not at issue in *Dost*. Not o
were the subjects "totally nude", 636 F.Supp. at 833, but
Dost court's theoretical application of the test made clear
assumption that some degree of nudity of the genitals or pu
area is a threshold requirement:

> For example, consider a photograph depicting a young girl reclining or sitting on a bed, *with a portion of her genitals exposed.* Whether this visual depiction contains a 'lascivious exhibition of the genitals' will depend on other aspects of the photograph. If, for example, she is dressed in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals. . . . On the other hand, if the girl is wearing clothing appropriate for her age, the visual depiction may not constitute a 'lascivious exhibition of the genitals', *despite the fact that the genitals are visible.*

(Emphasis added.) *United States v. Dost*, *supra*, 636 F.Su
at 832.

Nevertheless, in its initial decision, the Third Cir
inexplicably declared that the fourth *Dost* factor

> rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute.

977 F.2d at 823.

The Third Circuit understandably retreated from
position on remand, but still confused the purpose of the *D*
factors, which is to determine whether a given "exhibitio
the genitals or pubic area" is "lascivious", not whether th
has been an "exhibition of the genitals or pubic area" in
first place. Nowhere in *Dost* is there any suggestion tha
"exhibition of the genitals or pubic area" may be satisfied
one or more of the *Dost* factors. Rather, as the Ninth Cir
taught in *United States v. Arvin*, 900 F.2d 1385, 1391 (9th
1990), the *Dost* factors cannot even be applied until i
determined that there is an "exhibition of the genitals or pu
area":

> In formulating an instruction defining 'sexually explicit conduct' under § 2256(2)(E), the Court, of course, must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the [statute] itself, distinct from the additional requirement that the depiction be 'lascivious'.

Thus, *Dost* provides no support for the Third Circuit's expansive reading of the statute. Nor does any other case.

B. The Rule Of Lenity Requires Reversal Of Knox's Conviction.

Nothing in the statute, the legislative history, or case law suggests that § 2256(2)(E), encompasses depictions of fully clothed minors in which neither the genitals nor the pubic areas are exposed to view. The Third Circuit's interpretation of this criminal statute is admittedly expansive:

> Although our interpretation of an exhibition is *expansive*, the limiting principle in the statute is the requirement of lasciviousness.

(Emphasis added.) *United States v. Knox*, *supra*, 977 F.2d at 823. On remand, the Third Circuit retained this expansive interpretation (PA 45), which is constitutionally impermissible and violates the Rule of Lenity, "a rule of statutory construction whose purpose is to help give authoritative meaning to the statutory language." *United States v. Thompson Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2110 fn. 10, 119 L.Ed.2d 308 (1992).

The main purpose of the Rule of Lenity is, as Justice Stevens observed,

> to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

United States v. Thompson Center Arms Co., *supra*, 112 S.C
at 2114 (Stevens, J., dissenting).

The Third Circuit misunderstood Petitioner Stephe
Knox's argument that the Rule of Lenity prevents an expan
sive reading of the statute. Petitioner's argument is not, as th
Third Circuit characterized it, that the mere lack of pric
prosecutions invokes the Rule of Lenity. Rather, it is that
the Third Circuit were correct that the statute was meant t
criminalize depictions in which genitals and pubic areas wer
fully covered by clothing, then the statute, as written,
ambiguous and the Rule of Lenity requires Petitioner'
acquittal. The lack of prior prosecutions is powerful evidenc
that the statute as written failed to give Knox "fair warning
that his conduct was criminalized.

The Rule of Lenity requires such "fair warning" in lan
guage that the common world will understand. *Liparota*
United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 8
L.Ed.2d 434 (1985). *See also*, *McBoyle v. United States*, 28
U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed.2d 816 (1931
Neither the legislative history, nor the enforcement pattern o
the child pornography laws, nor legal precedent concernin
the phrase "lewd exhibition of the genitals" provide an
indication that depictions in which minors' genitals are full
covered are *or even could be* criminalized under 18 U.S.C
§ 2256(2)(E).

C. The Government Failed To Prove Knox Had the Req uisite *Scienter* To Violate The Statute.

Even assuming *arguendo* that a "lascivious exhibition o
the genitals or pubic area" may include exhibitions of mino
whose genitals are completely covered, Knox lacked the req
uisite *scienter* to commit the crime of receiving and possess
ing "child pornography" because he could not have know
that such depictions ran afoul of the statute. This is not just a
excuse that he was ignorant of the law. Given the history o
law enforcement in this area and the ubiquity of images o
minors whose genitals and pubic areas are fully covered b
clothing, no person could have foreseen that such image

would be found to constitute depictions of "sexually explicit conduct".

Common understanding of what laws mean encompasses not only the language of the statute itself, but also "the gloss which life has written upon it". *Nashville C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940). As Professor Bickel has noted, "[t]he average nonreader of the statute books knows of the law what he knows of ethics and customs, and for the rest, what he knows of prosecutions." Bickel, 'The Supreme Court - Foreward,' 75 *Harvard L. Rev.* 40, 63 (1961). The fact that every other prosecution under the statute has involved images of minors whose genitals or pubic areas were nude and exposed to view weighs heavily against any finding that Knox possessed the requisite *scienter* to violate the statute.

As 18 U.S.C. § 2256(2)(E) makes no reference at all to the supposed purpose of materials alleged to depict "sexually explicit conduct", Knox's purported awareness that the videotapes contained "materials designed to sexually arouse a pedophile" (See *United States v. Knox*, *supra*, 977 F.2d at 825) is completely irrelevant to the issue of knowledge. As the Third Circuit itself held in *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) "[w]hen a picture does not constitute child pornography . . . , it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *See also*, *Faloona v. Hustler Magazine, Inc.*, 607 F.Supp. 1341, 1344-45 (N.D. Texas 1985), affirmed *sub nom. Faloona by Frederickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986). There is no question but that many completely legal materials – for instance, depictions of mere nudity, lascivious displays of breasts or buttocks, or "alluring" images such as those often found in fashion magazines and clothing catalogs – may also be arousing to individuals so inclined.

Knowledge of the "general nature and character of t materials" is insufficient in this case to satisfy the *scien* requirement under the child pornography statute. In *Unit States v. United States District Court for Central Dist. Cal.*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held th the First Amendment requires that a defendant charged wi violating 18 U.S.C. § 2251(a) is entitled to an affirmati defense based on a reasonable mistake of age. In *Unit States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th C 1992), the Ninth Circuit found 18 U.S.C. § 2252 unconstit tional because the statute failed to require knowledge by t defendant that at least one of the persons depicted in the filı in question was a minor. Obviously, knowing that the mater depicted "sexually explicit conduct" was not enough if t defendant reasonably believed that the persons depicted we over the age of 18:

> The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers. . . . What the government seems to be saying . . . , however, is that the statute does not even require that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

United States v. X-Citement Video, Inc., 982 F.2d at 1287. *S also*, *United States v. Sherin*, 1987 WL 6146 (S.D.N.Y (judicially engrafting a *scienter* requirement regarding ag onto 18 U.S.C. § 2252 to save it from unconstitutionality

Nor is it enough that a defendant know that the perso depicted are under the age of 18 where, as here, he has reasonable belief that the conduct depicted does not constitu "sexually explicit conduct" as defined by 18 U.S.C § 2256(2). Thus, the Third Circuit's reliance on *Hamling United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910, 4 L.Ed.2d 590 (1974); *United States v. Brown*, 862 F.2d 103 (3d Cir. 1988); and *United States v. Moncini*, 882 F.2d 40

404 (9th Cir. 1989) is misplaced. Hamling, unlike Knox, was obviously aware that he was dealing with materials depicting sexual conduct of the type that could be found to be obscene – i.e., hard-core sex. Both Brown and Moncini knew they were dealing with depictions of minors and they knew that the minors were engaged in "sexually explicit conduct" as defined by the statute. Brown merely believed that the illegal materials depicted adolescent, rather than pre-pubescent, children (a fact irrelevant to guilt under the statute), while Moncini was simply unaware that mailing such materials to the United States was a crime (ignorance of the law).

Knox, however, relied upon the plain meaning of the statute, which does not encompass depictions of minors whose genitals are fully covered, and he knew from advertising brochures that the Nather videotapes contained no nudity and no sexual acts. While the brochures also boasted that the viewer would be sexually aroused by the videotapes, the statute does not criminalize images that are sexually arousing, but rather ones that depict minors engaged in "sexually explicit conduct". Unlike the defendants in *Moncini* or *Brown*, in both receiving and possessing the videotapes, Knox had an objectively reasonable belief that they did not violate the law. Such a belief bars his conviction. In the alternative, a reasonable mistake as to the legality of the materials must be a defense.

D. If There Can Be An "Exhibition Of The Genitals Or Pubic Area" Under 18 U.S.C. § 2256(2)(E) Where The Genitals And Pubic Area Are Fully Covered By Clothing, Then 18 U.S.C. § 2256(2)(E) Is Unconstitutionally Vague And Overbroad.

As construed by the Third Circuit, 18 U.S.C. § 2256(2)(E) is unconstitutional for both vagueness and overbreadth. As this Court recognized thirty years ago:

> The objectionable quality of vagueness and overbreadth . . . [rests] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-3 (1963).

1. As Construed By The Third Circuit, The Statute Is Overbroad.

As construed by the Third Circuit, the term "lascivious exhibition of the genitals" is not sufficiently precise or narrow to pass constitutional muster as a restriction on artistic expression. *New York v. Ferber*, *supra*, sets forth the narrowly tailored parameters of a constitutionally acceptable child pornography law: "[t]he conduct to be prohibited must be adequately defined"; the offense must be "limited to works that visually depict sexual conduct by children below a specified age", that is, "performing sexual acts or lewdly exhibiting their genitals"; and "[t]he category of 'sexual conduct' must also be suitably limited and described". 458 U.S. at 763-4.

The Third Circuit's interpretation of the phrase "lascivious exhibition of the genitals" goes far beyond these parameters, by defining virtually *every* frontal image of a minor, nude or clothed, as an "exhibition of the genitals or pubic area" and by expanding the definition of "sexually explicit conduct" to include innocent conduct, such as dancing or modeling, simply because that conduct "appeals to the lascivious interest of the intended audience". PA 25.

If the Third Circuit's admittedly expansive test is permitted to stand, the chilling effect of the federal statute will be enormous. Anyone who has photographed a minor at a dance

recital or gymnastics meet (where dancers and gymnasts typically adopt "unnatural" and "spread leg" poses), at the beach or at home (where minors may be found to be "scantily clad" in bathing suits, sometimes wet, and underwear) will immediately understand the danger of their depictions ultimately being deemed "lascivious" under the Third Circuit's expansive definitions. Mainstream creators, publishers, producers, distributors and retailers will avoid creating and handling publications, motion pictures, or other visual media depicting minors for fear of running afoul of the law as interpreted by the Third Circuit.

It is hardly comforting that "the limiting principle in the statute is the requirement of lasciviousness", when the Third Circuit employs the *same* criteria to determine what constitutes an "exhibition of the genitals or pubic area" as it does to determine whether an exhibition is "lascivious". "For instance," the Third Circuit argued,

> the first *Dost* factor, 'whether the focal point of the visual depiction is on the child's genitalia or pubic area' [citation omitted], may play an important role in the determination of whether the child subject's genitals or pubic area are on exhibit within the meaning of the statute.

PA 32.

See also PA 21, quoted above, where the Third Circuit concluded that "the scantily clad genitals or pubic area of young girls can be 'exhibited' in the ordinary sense of the word" *because* depictions of them "apparently still provide considerable interest and excitement for the pedophile observer." Given the Third Circuit's definition of "lasciviousness" as that "which would appeal to the lascivious interest of an audience of pedophiles" (PA 26), there is little to distinguish a "lascivious" from a non-lascivious "exhibition of the genitals or pubic area".

Such overbreadth cannot constitutionally be tolerated. When this Court upheld as constitutional the New York child pornography statute, it warned:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute *by*

> *giving an expansive construction* to the proscription on 'lewd exhibition[s] of the genitals'.

(Emphasis added.) *New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

A definition of "exhibition" which includes depictions of minors whose genitals are completely covered violates not only *Ferber*'s constitutionally mandated admonition, but also a time-honored rule of statutory construction:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. [Citation omitted].

New York v. Ferber, 458 U.S. at 769, 102 S.Ct. at 3361.

In short, the Third Circuit's expanded construction of 18 U.S.C. § 2256(2)(E) is precisely that against which this Court warned in *Ferber* as potentially criminalizing a "broad range of innocent conduct".

2. As Construed By The Third Circuit, The Statute Is Void For Vagueness.

A statute which fails to provide adequate notice as to what conduct is prohibited is vague and cannot survive constitutional scrutiny. *Rabe v. Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972). ("To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed.") It is well-established that criminal statutes must contain specific and objective standards so that law enforcement officers may not engage in arbitrary prosecutions and so that citizens, including artists, parents, producers and distributors of mainstream books, magazines, motion pictures, and other visual materials, need not guess at the law's meaning. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). These requirements are even stricter in the First Amendment context, where a higher specificity standard must be met. *Village of Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). As the Supreme Court held in *Winters v. New York*, 333 U.S. 507, 515, 519 (1948),

> There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. . . . [W]e think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know who would draw the line between the allowable and the forbidden publication.

Congress recognized the pernicious problem of vagueness in 1977 when it rejected the phrase "nudity . . . depicted for the sexual stimulation or gratification of any individual who may view such depiction". Clearly, when Congress rejected that phrase and adopted the term "lascivious exhibition of the genitals", it could not have intended to criminalize depictions of fully clothed minors depicted for the same purpose.

Depictions of minors whose genitals and pubic areas are fully covered by clothing such as leotards, bathing suits, and underwear are indisputably ubiquitous and can be found in newspapers, books, and magazines, clothing catalogs, family albums, on the walls of art museums, in movies and on television, at fashion shows, dance recitals, and gymnastics and swimming meets. If the Third Circuit's interpretation of the statute is permitted to stand, photographers, publishers, parents, distributors, and the public in general will be left guessing if the images they create, publish, sell, and possess daily run afoul of the child pornography law because they were taken at the wrong angle or in the wrong place, time or setting,[20] or because the minor posed in a stance or with a facial expression that was too "adult", or the camera "zoomed in" too closely, or the image might be arousing to

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[20] One factor cited by the Third Circuit, without explanation, as supporting its finding that the minors depicted in the videotapes were engaged in a "lascivious exhibition of the genitals" was that "[n]early all of [the] scenes were shot in an outdoor playground or park setting where children are normally found". PA 26.

"pedophiles". Because no one can predict with reasonable certainty which depictions of minors whose genitals are fully covered by clothing might fall within the definition of 18 U.S.C. § 2256(2)(E) as interpreted by the Third Circuit, the law, as construed, is unconstitutionally vague.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed June 9, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7089

UNITED STATES OF AMERICA

v.

STEPHEN A. KNOX,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. No. 91-00074)

Argued August 17, 1992

Decided October 15, 1992

Certiorari Granted June 7, 1993

On Remand from the Supreme Court of the United States
November 1, 1993

Reargued April 27, 1994

Before: HUTCHINSON, COWEN and
WEIS, *Circuit Judges*

(Filed June 9, 1994)

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

The principal question presented by this appeal is whether videotapes that focus on the genitalia and pubic area of minor females constitute a "lascivious exhibition of the genitals or pubic area" under the federal child pornography laws, 18 U.S.C. §§ 2252(a)(2), (4) and 2256(2)(E) (1988 & Supp. IV 1992), even though these body parts are covered by clothing. When this case first came before us, we held that such visual depictions do qualify as lascivious exhibitions and that this interpretation does not render the statute unconstitutionally overbroad. *United States v. Knox*, 977 F.2d 815, 820-23 (3d Cir. 1992), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993).

At the Supreme Court's instruction, we have further considered this case "in light of the position asserted by the Solicitor General in his brief for the United States," *Knox v. United States*, __ U.S. ___, 114 S. Ct. 375 (1993). In that brief and in its subsequent brief filed in this court after the Supreme Court remand, the government argues that the plain language of the statute requires the genitals or pubic area exhibited to be at least somewhat visible or discernible through the child's clothing. We hold that the federal child pornography statute, on its face, contains no nudity or discernibility requirement, that non-nude visual depictions, such as the ones contained in this record, can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad. Finally, we again conclude that the government presented sufficient evidence at the bench trial to establish both the necessary mens rea and the delivery of the films through interstate mail. We thus will reaffirm Knox's conviction.

I.

In March of 1991, the U.S. Customs International Branch intercepted a mailing to France which contained a request that two videos, "Little Girl Bottoms (underside)" and "Little Blondes," be sent to J. Richard Scott, 210 West Hamilton Avenue, No. 108, State College, Pennsylvania. The parcel also contained a check drawn on the account of defendant Stephen A. Knox and bearing his signature. The check listed his address as 210 East Hamilton Avenue, No. 25, State College, Pennsylvania. A second envelope addressed to J. Richard Scott from the Netherlands

also was confiscated and contained a catalogue advertising for sale videotapes depicting nude, semi-clothed, and clothed minors. Aware that Knox previously had been convicted of receiving child pornography through the mail, the customs investigators obtained a search warrant and with the assistance of the Pennsylvania State Police searched his apartment.[1]

The police officers seized three video cassettes produced by the Nather Company (hereafter "Nather Tapes"), a videotape distribution company based in Las Vegas, Nevada. A catalogue from the Nather Company with checkmarks next to several video selections was also removed from Knox's apartment. One of the marked videos in the brochure corresponded to a segment of a compilation tape which was seized. Envelopes addressed to Nather and Nather mail order forms were discovered as well as a carbon copy of a money order payable to Nather Company for an amount approximately equal to the price of a single video.

The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera. The children were obviously being directed by someone off-camera. All of the children wore bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed. The government conceded that no child in the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by

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[1] The district court determined that the search of Knox's apartment did not violate the Fourth Amendment, and Knox does not contest this decision on appeal.

an abbreviated article of clothing. The photographer would zoom in on the children's pubic and genital area and display a close-up view for an extended period of time. Most of the videotapes were set to music. In some sequences, the child subjects were dancing or gyrating in a fashion not natural for their age. The films themselves and the promotional brochures distributed by Nather demonstrate that the videotapes clearly were designed to pander to pedophiles.

The United States prosecuted Knox based exclusively on the three Nather tapes. Knox was indicted on two counts: (1) knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct; and (2) knowingly possessing three or more videotapes that contain a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2) and (4). "Sexually explicit conduct" for both of these offenses is defined to include a "lascivious exhibition of the genitals or pubic area." *Id.* § 2256(2)(E).

Pursuant to Federal Rule of Criminal Procedure 12(b), Knox filed a pre-trial motion to dismiss the indictment contending that the videos did not contain an "exhibition" of the genitals or pubic area since these areas were always covered by underwear, leotards, or a bathing suit. Knox and the government agreed to a pre-trial hearing to determine whether the indictment was facially sufficient. The district judge viewed portions of the Nather tapes which the parties stipulated were representative of the material contained in the videos. To determine the meaning of the statutory language "exhibition of the . . . pubic area," the district court looked to the plain meaning of the words. Since the pubic area is

located directly adjacent to the genitalia, the district court concluded that other areas in close proximity to the genitals, specifically the "uppermost portion of the inner thigh," were also included in the statutory definition of the pubic area. *District Court Memorandum* at 14; App. at 41. Since the upper portion of the inner thigh was clearly exposed, the court held that the tapes contained an exhibition of the pubic area, and therefore denied Knox's motion to dismiss the indictment.

Knox waived his right to a jury trial and a bench trial was held. At the bench trial, all of the exhibits and testimony from the pre-trial hearing were incorporated into the record for purposes of the trial. Additionally, the government admitted into evidence advertising catalogues from Nather, Nather mail order forms, and envelopes addressed to the Nather Company which were seized from Knox's apartment. The catalogues described in detail the contents and intended effect of the films that could be purchased:

> "Sassy Sylphs" will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

District Court Memorandum at 11; App. at 38.

The government also introduced evidence to establish that Nather mailed the tapes from its office in Nevada to the mailbox which Knox had rented under a fictitious name. Finally, the carbon copy of a sixty-two dollar money order payable to Nather was admitted to prove the method of payment. Although Knox did not testify and called no defense witnesses, he introduced magazine advertisements for Nather's videotapes which claimed that the absence of complete nudity rendered the tapes legal to purchase and possess.

The district court found Knox guilty on both counts. Thereafter, on February 13, 1992, Knox filed a motion for a judgment of acquittal or, alternatively, as he styled it, an application for a hearing to explore the anatomical issue decided by the court, predicated upon the contention that the uppermost portion of the inner thigh is not the pubic area. In conjunction with this motion, Knox submitted the affidavit of Dr. Todd Olsen, Director of Human Gross Anatomy at the Albert Einstein College of Medicine. The affidavit of Dr. Olsen stated that defining the pubic area to encompass the uppermost portion of the inner thigh is anatomically incorrect. Since the motion was filed three months after entry of the verdict, the district court denied the motion as untimely. Knox was sentenced to the minimum mandatory term of imprisonment of five years for each court, to be served concurrently. The sentence has been stayed pending the outcome of this appeal.

Knox appealed the denial of the motion to dismiss the indictment, the guilty verdict, and the denial of the

post-trial motion for judgment of acquittal.[2] We upheld Knox's conviction. In doing so, we interpreted the statutory phrase "exhibition of the genitals or pubic area" as encompassing the lascivious focus on these body parts even though they were always covered by underwear, leotards, or other thin but opaque clothing. *United States v. Knox*, 977 F.2d 815, 820-23 (3d Cir. 1992), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993). We are the first, and to date only,[3] court which has interpreted the

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[2] In our prior consideration of this case, we addressed as a preliminary matter whether we had jurisdiction to review the issues presented in Knox's untimely post-trial motion for a judgment of acquittal. *See United States v. Knox*, 977 F.2d 815, 818-19 (3d Cir. 1992) (Part II), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993). We decided not to address the merits of the motion because we concluded that the district court had not abused its discretion in declining to entertain it in the first instance. *Id.* at 819. We next addressed whether a nude display of the uppermost portion of a minor subject's inner thighs can be a lascivious exhibition of the pubic area. *Id.* at 819-20 (Part III). We concluded that it could not because this portion of the human anatomy is not part of the pubic area as defined in the most widely accepted human anatomy treatises. *Id.* at 819. Because neither Knox nor the government, nor any of the various amici parties, have argued that those conclusions are erroneous, we need not address them in this opinion other than to say that we adhere to the analysis and conclusions set forth in our prior opinion which was vacated by the Supreme Court.

[3] According to several of the briefs submitted to this court, Knox's prosecution is the only one that has been brought by the government where the criminal materials at issue do not contain any nudity at all. The government did not dispute this contention in its brief or at oral argument after remand from the Supreme Court. Thus, for purposes of this appeal we will assume that the contention is true. Of course, we recognize that a prosecutor always has broad discretion to decide the circum-

statute to allow for a conviction under these circumstances.

II.

After we affirmed his conviction, Knox successfully petitioned the U.S. Supreme Court for certiorari. *See Knox v. United States*, ___ U.S. ___, 113 S. Ct. 2926 (1993). In this petition for certiorari, Knox presented four issues, most of which focus on whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.[4] In its brief opposing the grant of

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stances that warrant prosecution of a person for what the prosecutor fairly believes is unlawful conduct. When the prosecutor decides to prosecute, however, it is the exclusive function of the judiciary to determine whether the conduct charged is unlawful unless the prosecutor then withdraws the prosecution.

[4] The four questions presented by Knox in his petition for certiorari are the following:

> 1) Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.
>
> 2) Where no other prosecution has ever been brought and no there arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and was told that the videotape was therefore legal, did the government introduce sufficient proof of *scienter* to support a guilty verdict?
>
> 3) Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully

certiorari, the government supported the theory we adopted in upholding Knox's conviction. After the grant of certiorari, and the change in administration following President Clinton's election, the government took a different position.

The government's new position is that while complete nudity is not absolutely required for a depiction to constitute a criminal "exhibition," this court "erred in holding that simply focusing on the midsection of a clothed body may constitute an 'exhibition' of the unrevealed body parts beneath the garments." Gov't Sup. Ct. Brief (Sept. 1993) at 10. In the government's view, a criminal "exhibition" requires both that the visual depiction focus in on the body parts and that it render them visible or discernible in some fashion. *Id.*

Reviewing the legislative history, the government noted that the Justice Department in 1977 had made a suggestion to substitute the phrase "lewd exhibition of the genitals or pubic area" for a more vague phrase in order to more clearly delineate "what *types of nude portrayals* of children were intended to be encompassed" within the statute. *Id.* at 11 (quot.ng *Protection of Children*

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covered by an article of clothing, is an objectively reasonable good faith belief in the legality of the depiction a valid affirmative defense?

4) Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

Knox's Petition for a Writ of Certiorari (Sup. Ct. No. 92-1183, October Term, 1992) at (i).

Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 77-78 (1977), *reprinted in* 1978 U.S.S.C.A.N. 63 (letter from Patricia M. Wald, Assistant Attorney General to James O. Eastland, Chairman, Committee of the Judiciary)) (emphasis added by government). The government reads this legislative history as an indication that Congress only intended to criminalize depictions that are at least partly nude in nature. In our prior opinion, we distinguished this legislative history by noting that the language of the Wald letter assumed that Congress only intended to criminalize nude depictions because the language of the bill at that time contained the word "nudity."

As to the scope of nudity required, the government did not go so far as to agree with Knox that complete nudity is required. Rather, the government asserted that Congress intended to criminalize depictions of genitals that are at least somewhat visible. *Id.* at 11-12. Thus, the government stated that a child's genitals which are covered by a transparent or nearly transparent garment, or clothing that is so tight as to reveal completely the contours of the genitals, would constitute a criminal "exhibition" within the meaning of the statute. *Id.* at 12.[5] Ultimately, the government believes that the child's genitals or pubic area must be "discernible" through his or

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[5] The government acknowledged that the adoption of such a standard would be more easily applied to depictions of boys than girls because of obvious anatomical differences. *Id.* at 12 n.3.

her tight clothing in order for the exhibition to be child pornography under 18 U.S.C. § 2256(2)(E).

The government put forth a second reason why our prior opinion could not be fully supported. Relying on the introductory statutory language which states that § 2252(a) covers only depictions involving "the use of a minor *engaging in* sexually explicit conduct," 18 U.S.C. § 2252(a) (emphasis added), the government concluded that a criminal "exhibition" exists only where "the minors who appear in the videotapes can be said to have been acting or posing lasciviously." Gov't Sup. Ct. Brief (Sept. 1993) at 13. Thus, according to the government's position, the appropriate inquiry is on whether the child lasciviously poses her (or someone else's) genitals or pubic area. *See id.* Because neither this court nor the district court interpreted the statute in this fashion, the government requested that the Supreme Court vacate the judgment and remand for reconsideration in light of the "correct" statutory standard.

The government also addressed two related issues in its Supreme Court brief. First, it argued that adoption of the advocated statutory standard would not render the statute unconstitutionally vague or overbroad. *Id.* 14-17.[6] Finally, the government supported that part of our prior opinion which rejected Knox's argument that he did not possess the necessary mens rea to violate the child pornography statute because he did not know the illegal nature of the contents of the videos, and because he relied

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[6] We reject Knox's arguments concerning overbreadth in our prior opinion by finding the term "lascivious" as the limiting principle. *See Knox*, 977 F.2d at 823.

on disclaimers which accompanied the videotapes from their commercial source. *Id.* at 17-20; *see also Knox*, 977 F.2d at 824-25.

In the final section of its Supreme Court brief, the government states that the videotapes at issue in this case might be deemed unlawful under the statutory standard advocated in its brief. Because we did not interpret the statute consistently with the government's new position, the government requested that the case "be remanded so that the Court of Appeals can assess the sufficiency of the evidence under the proper legal standard." Gov't Sup. Ct. Brief (Sept. 1993) at 20. The government clarified that the only task necessary on remand was for this court "simply to determine whether the evidence was sufficient, under the correct legal standard, to support a general verdict of guilty." *Id.* at 23.

Upon the close of briefing in the Supreme Court, but before the case was argued, the Court vacated the judgment and remanded. *See Knox v. United States*, ___ U.S. ___, 114 S. Ct. 375 (1993). The Supreme Court's mandate states the following: "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed September 17, 1993." *Id.* Our charge on remand is to further consider our interpretation of the statute in light of the interpretation advanced by the government in its brief to the Supreme Court.[7]

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[7] After the Supreme Court remanded the case, we granted amicus curiae status to five interested parties, all of which have

III.

Before turning to the merits of the case, we must address on procedural issue. After the Supreme Court vacated the judgment and remanded the case for further consideration, on December 23, 1993 the government filed a Motion to (further) remand the case to the district court. This motion was made during the new briefing schedule established by us on November 17, 1993. The government's motion sought an immediate remand for the purpose of a retrial in the district court to be conducted according to the interpretation of § 2256(2)(E) advocated by the government.

In its motion, the government stated that at the new trial, if granted, it intends to introduce evidence which was not offered at the original trial pursuant to an agreement between Knox and the government whereby the defense agreed to a bench trial in return for use at trial of only certain specific videotapes (i.e., the three Nather tapes). The government requested a suspension of the briefing schedule and an immediate remand to the district court. We entered an order denying the government's request for an immediate remand and a suspension of the briefing schedule; we did, however,

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submitted briefs in this court. Four of the amici parties urge us to reaffirm Knox's conviction on the theory adopted in our prior opinion: 234 Members of Congress; The Institute for Media Education; National Law Center for Children and Families et al.; and National Family Legal Foundation and Morality in Media. The final amicus party, American Booksellers Foundation for Free Expression et al., supports Knox and argues that his conviction on the child pornography charges should be reversed.

inform the parties that we would further consider the merits of the government's motion following the briefing schedule and oral argument.

Other than the arguments made in the December 23, 1993 Motion to Remand, the government has not further briefed this issue. In its brief on the merits, however, the government renews its request that we remand the case to the district court for a new trial. Gov't Brief (March 1994) at 28.

The government argues that a remand is in order because it has espoused a standard for interpreting the child pornography statute that was not used by this court in reviewing the conviction, and that was not used by the district court at trial. Thus, the government believes that Knox should be retried according to the standard urged by the government. According to the government, a retrial would require factual determinations concerning the evidence which would be inappropriate for this court to make, specifically factual findings as to whether any of the depictions in the videos reveal pubic areas or genitalia which are discernible through the opaque clothing. For this reason, as well as others, the government seeks a remand to the district court for a new trial.

In its Motion to Remand, the government also noted that in his reply brief filed in the Supreme Court, Knox requested a remand to the district court in the event the Supreme Court agreed with the government concerning the newly proposed interpretation of the child pornography statute. As noted previously, the government admitted in its motion that if we agree to a remand, it will seek to introduce different evidence at trial. The government

argues that this is still the appropriate course for the case at this juncture given that this court will have a fully opportunity to review the district court's application of the proposed statutory standard in the event that Knox is convicted again.

Following the remand from the Supreme Court, Knox now opposes the government's motion to remand the case. First, Knox argues that a remand for a new trial arguably would run directly contrary to the Supreme Court's mandate for us to reconsider our previous opinion "in light of the position asserted by the Solicitor General," *Knox*,___U.S. ___, 114 S. Ct. 375.[8] Knox also argues that the government's new position raises an ambiguity concerning the statute to which the rule of lenity must be applied. Although Knox has not fully briefed this argument, he contends that jeopardy has attached and that appellate review of the trial record might result in his acquittal as a matter of law. Thus, Knox argues that a remand for the purpose of giving the government a second bite at the evidentiary apple would be constitutionally inappropriate as a violation of the Double Jeopardy Clause of the Fifth Amendment.

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[8] Knox, noting that the case has created a political firestorm, therefore believes that the government wishes to avoid criticism by using additional evidence to gain a conviction in a new trial because the existing record does not contain sufficient evidence to uphold the conviction under the "discernible genitals" standard proposed by the government. We express no opinion concerning this contention.

Amici curiae parties, including the amici Members of Congress, also filed answers in opposition to the government's motion for remand. The amici parties make several arguments as to why granting the motion would be inappropriate. Essentially, they argue that a remand would arguably violate the Supreme Court's mandate, that the only disputed issue is legal in nature and should be decided by this court, and that Supreme Court precedent does not support the view that if at some time during the proceeding both parties seek a remand to the district court, that an appellate court must adhere to that request.

We will deny the government's Motion to Remand because we believe that an immediate remand to the district court for purposes of conducting a retrial without first deciding the legal issue before us would violate the Supreme Court's mandate to this court. The Supreme Court vacated our judgment and remanded the case to us, not the district court, "for further consideration in light of the position asserted by the Solicitor General in his brief for the United States." *Knox v. United States*,___U.S.___, 114 S. Ct. 375 (1993).

In the government's Supreme Court brief, the Solicitor General merely argued that the interpretation of the child pornography statute adopted in our prior opinion was legally incorrect. The government advocated the adoption of a different statutory standard, one that requires the contours of the genitalia or pubic area to be discernible through the opaque clothing in order for possession of the material to be criminal. By remanding the case to this court for further consideration in the first

instance, the Supreme Court declined to address the purely legal question presented.

Although the government's Supreme Court brief did at one point request a remand to this court *or the district court*, it did so only for the purpose of applying the legal standard newly espoused by the government.[9] The government never argued in its Supreme Court brief that the case ought to be remanded to the district court in order for the prosecution to introduce additional evidence

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[9] The government's Supreme Court brief refers to or advocates a remand in five different places. *See* Gov't Sup. Ct. Brief (Sept. 1993) at 9-10, 13, 20, and 23 (both in Part IV and Conclusion). At only one point in the brief did the government mention a remand to the district court. *See id.* at 20. There, the government stated: "[I]f the Court agrees that an incorrect construction of the statutory phrase was used below, the appropriate disposition is to *remand the case to the court of appeals* for application either by that court or the district court of the correct standard to the facts of this case." *Id.* (emphasis added. Thus, even where the brief did mention the district court, it did so only for the purpose of indicating that the appropriate trier of fact should apply the law once it has been adopted or clarified by this court (the court of appeals). Even here the government's Supreme Court brief advocated a remand to this court for reconsideration of the purely legal issue of statutory interpretation. At no point did the government's Supreme Court brief mention the possibility of introducing new evidence at trial if it were to be remanded to the district court. Finally, in the Conclusion section of its brief, the government explicitly requested "a remand to the court of appeals for further proceedings," not to the district court for a new trial. *See id.* at 23. Given that the government sought a remand to this court by the Supreme Court, the Court's simply worded mandate that this court further consider our statutory interpretation makes perfect sense.

which, if admitted, might moot the entire statutory interpretation issue which confronted the Supreme Court and now confronts this court on remand. But that is just the course the government now advocates with its Motion to Remand.

If we were to agree to an immediate remand to the district court for the purpose of holding a retrial with additional evidence, we would be disposing of the case in a manner that was not presented to or contemplated by the Supreme Court. Given that the Supreme Court did not consider the government's requested disposition as an option, it ordered us to further consider our prior interpretation of the child pornography statute in light of the newly advanced standard espoused by the government. If we fail to address the legal issue directly presented by the Solicitor General's brief and the Supreme Court mandate, then arguably we will be ignoring simple instructions from our higher authority. Furthermore, in light of our disposition upholding Knox's conviction after further consideration, the issue of a remand to the district court for a new trial is moot.

Finally, it is important to address another aspect of the government's Motion to Remand. In several instances the government argues that a remand to the district court is exactly the remedy Knox sought in the Supreme Court in the event that the Court agreed that we had adopted the wrong statutory standard. However, Knox requested this disposition only in the Supreme Court, not in this court, and only before the government proposed a remand to the district court for the purpose of introducing additional evidence during the retrial.

Knox sought a remand to the district court for a new trial only if the Supreme Court adopted the government's "discernible genitals" statutory standard, because in Knox's view the record evidence does not support a conviction even under that standard. Therefore, the government's position that the case should be immediately remanded to the district court for a new trial using additional evidence is not advanced in any fashion by the fact that Knox sought a remand from the Supreme Court before the government revealed it would attempt to introduce different evidence in the event a new trial was granted. It is logical for a convicted criminal defendant to seek the alternative remedy of a remand for a new trial in the event an appellate court does not agree that the conviction cannot stand because the evidence was insufficient to convict. In this case, however, the Supreme Court did not address the legal issue, instead leaving it for us to address in the first instance.

Under these circumstances, Knox now opposes a remand to the district court for a new trial using additional evidence and it is not relevant that in the Supreme Court Knox requested a remand to the district court as an alternative remedy to that of an outright acquittal for insufficiency of evidence. *See, e.g., Garcia v. United States*, 469 U.S. 70, 79, 105 S. Ct. 479, 484 (1984) ("[P]rivate agreements between litigants, especially those disowned, cannot relieve this Court of performance of its judicial function. It is our responsibility to interpret the intent of Congress . . . irrespective of petitioners' or respondent's prior or present views.") Since we will deny the government's Motion to Remand because granting it would violate the Supreme Court's mandate, we need not

address whether adopting such a course would implicate double jeopardy concerns.

IV.

We now turn to the merits of the case on remand. The Protection of Children Against Sexual Exploitation Act of 1977, as subsequently amended, criminalizes knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct and knowingly possessing three or more videotapes which contain a visual depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252(a)(2), (4). "Sexually explicit conduct" for purposes of both of these offenses is defined to include the "lascivious exhibition of the genitals or pubic area." *Id.* § 2256(2)(E). In our prior opinion, we held that the statute contains no nudity requirement because the above quoted statutory phrase refers to a "lascivious exhibition," not a nude or naked exhibition. *Knox*, 977 F.2d at 820. Our review of the relevant legislative history revealed that Knox had not met his burden of demonstrating that Congress clearly intended the statute only to proscribe nude or partially nude displays of the genitals or pubic area. *Id.* at 820-21. Because the meaning of the statutory phrase "lascivious exhibition" under 18 U.S.C. § 2256(2)(E) poses a pure question of law, our review is plenary. *United States v. Brown*, 862 F.2d 1033, (3d Cir. 1988).

Defendant Knox continues to assert that the genitals or pubic area must be unclad or nude, and fully exposed to the camera, before an exhibition may occur. Several amici parties, including the amici Members of Congress, support our prior statutory interpretation that no nudity

is required. The government contends that the pictorial representation of the genitals or pubic area, covered only by underwear, a bikini bathing suit, a leotard, or other abbreviated attire, constitutes a lascivious exhibition if (1) those body parts are at least somewhat visible in the videotapes, and (2) the minors were engaged in conduct that can be judged "lascivious."

When interpreting a statute, the starting point is always the language of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 1537 (1982). Courts presume that Congress expressed its legislative intent through the ordinary meaning of the words it chose to use, *Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 591 (1962); *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979), and if the statutory language is clear, it is not necessary to glean congressional intent from legislative history, *TVA v. Hill*, 437 U.S. 153, 184 n.29, 98 S. Ct. 2279, 2296 n.29 (1978); *Barnes v. Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126 (1985). Thus, it is axiomatic that when the statutory language is clear, the words must be interpreted in accordance with their ordinary meaning. *Dewalt v. Sullivan*, 963 F.2d 27, 30 (3d Cir. 1992). Only the most extraordinary showing of contrary congressional intent may justify altering the plain meaning of a statutory term. *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988).

Knox attempts to read a nudity requirement into a statute which has none. The amended Protection of Children Against Sexual Exploitation Act criminalizes the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E). In ordinary legal usage, the word "exhibit" means "[t]o show or display; to offer or present

for inspection." Black's Law Dictionary 573 (6th ed. 1990). The genitals or pubic area need not be fully or partially nude in order to be shown or put on display. This plain meaning of the term "exhibition" is confirmed by reference to a popular dictionary of the English language, which defines "exhibit" as "[t]o display; as: a. [t]o present for consideration; set forth . . . . b. [t]o present to view; to show, esp. in order to attract notice to what is interesting or instructive," Webster's New International Dictionary 893 (2d ed. 1959).

Despite our understanding that the ordinary meaning of the term "exhibition" does not require nudity, the government urges us to adopt an intermediate statutory standard which requires that the depiction in question render the minor's genitals or pubic area visible or discernible in some fashion in order to constitute an exhibition. The government attempts to provide support for its "discernible genitals" standard from the plain meaning of the statutory terms and from the legislative history. First, the government argues that the ordinary meaning of the term "exhibition," as used in the statute, contemplates that the genitals or pubic area of the minors depicted must be visible or discernible in some fashion. Absent some visibility or discernibility of the genitals or pubic area, the government in effect agrees with Knox that the depiction is an exhibition of the clothing covering the body parts, rather than an exhibition of the body parts themselves.

In support of this reading of the statute, Knox makes reference to an analogy between the depictions contained in the Nather tapes and an art exhibition. He argues that a celebrated piece of sculpture such as Michelangelo's

David would not be exhibited or on display at all if there was an opaque dropcloth covering the sculpture from head to toe. The government in essence agrees, although it concedes that there would be an exhibition of the sculpture if the *David's* prominent features were discernible or otherwise visible through the dropcloth.

We disagree with this reasoning because we believe that the analogy entirely misses the mark. It may well be that if a work of art is completely covered, any and all of its meaning and value to an observer is lost. That is, any and all of the magnificent qualities which one seeks from viewing the *David* are destroyed by completely covering the statue. In this sense, the completely covered work of art is not being exhibited. In contrast, it is not true that by scantily and barely covering the genitals of young girls that the display of the young girls in seductive poses destroys the value of the poses to the viewer of child pornography. Although the genitals are covered, the display and focus on the young girls' genitals or pubic area apparently still provides considerable interest and excitement for the pedophile observer, or else there would not be a market for the tapes in question in this case. Thus, the scantily clad genitals or pubic area of young girls can be "exhibited" in the ordinary sense of that word, and in fact were exhibited in the tapes which are the subject of Knox's conviction. The analogy made by Knox and the government to exhibitions of covered works of art fails on its own terms.

In any event, we are not called on in this case to interpret the imaginary statutory phrase "art exhibition." Rather, we are called upon to decipher Congress' intent concerning the statutory phrase "lascivious exhibition of

the genitals or pubic area" as used in the federal child pornography statute, 18 U.S.C. § 2256(2)(E). Thus, we must focus not on what would or would not constitute an art exhibition, but rather on whether the ordinary meaning of the term "lascivious exhibition" includes the fully covered genitals or pubic area of minor children.

In pursuing this task, we believe the principle that "[w]ords take on meaning in the company of other words," *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994), is relevant when interpreting terms contained in a statute which Congress passed to curb a particular evil. *See Deal v. United States*, ___ U.S. ___, ___, 113 S. Ct. 1993, 1996 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). As discussed more fully below, Congress aimed the federal child pornography statute at combatting "the use of children as subjects of pornographic materials[, which] is harmful to the physiological, emotional, and mental health of the child." *New York v. Ferber*, 458 U.S. 747, 758, 102 S. Ct. 3348, 3355 (1982); *see also id.* at 758 n.9, 102 S. Ct. at 3355 n.9. In so doing, Congress defined the "lascivious exhibition of genitals or pubic area" as one variety of "sexually explicit conduct" proscribed by the statute. Thus, we find it more meaningful to focus on the ordinary meaning of the statutory term "lascivious exhibition," rather than simply focusing on the term "exhibition" divorced entirely from the context in which it was used.

The term "lascivious" is defined as "[t]ending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect to sexual relations; licentious." Black's Law Dictionary 882 (6th ed. 1990). Hence, as used in the child pornography statute, the ordinary meaning of the phrase "lascivious exhibition" means a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer. Such a definition does not contain any requirement of nudity, and accords with the multi-factor test announced in *United States v. Dost*[10] for determining

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[10] 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S. Ct. 164 (1987). The *Dost* factors were articulated in order to provide a more concrete test for determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E):

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
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> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
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> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
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> 4) whether the child is fully or partially clothed, or nude;
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> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F. Supp. at 832. The court readily admitted that this list is not exhaustive as other factors may be relevant in particular cases. *Id.*

We formally adopted the *Dost* factors as the relevant test for determining lasciviousness in *United States v. Villard*, 885 F.2d 117,

whether certain material falls within the definition of 18 U.S.C. § 2256(E)(2). Nor does such a definition contain or suggest a requirement that the contours of the genitals or pubic area be discernible or otherwise visible through the child subject's clothing.

The genitals and pubic area of the young girls in the Nather tapes were certainly "on display" as the camera focused for prolonged time intervals on close-up views of these body parts through their thin but opaque clothing. Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the term "lascivious exhibition" leads to the conclusion that nudity or discernibility are not prerequisites for the occurrence of an exhibition within the meaning of the federal child pornography statute.[11]

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122 (3d Cir. 1989). The analysis is qualitative and no single factor is dispositive. *Id.* Other federal courts have also relied on the *Dost* factors for this purpose. *See United States v. Arvin*, 900 F.2d 1385, 1390-91 & n.4 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 672 (1991); *United States v. Wolf*, 890 F.2d 241, 244, 46 (1th Cir. 1989); *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987) (discussing the six *Dost* factors without citing to the *Dost* case); *United States v. Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987); *United States v. Mr. A.*, 756 F. Supp. 326, 328-29 (E.D. Mich. 1991).

[11] We note that were we to agree with the government that the correct statutory standard requires the minor subject's genitals or pubic area to be discernible through his or her clothing, we would have no trouble upholding Knox's conviction. We have viewed the Nather tapes. In several sequences, the photographer has focused unnaturally on the genitals of the young girls in close-up shots which reveal the outer contours of the genitals through their tight bathing suits, leotards, or underwear.

Our task of further examining the statutory language in light of the Solicitor General's position also requires us to address whether in our prior opinion we overlooked a requirement that the minor subjects be engaged in conduct that can be judged "lascivious." According to the government, this interpretation of the statute is made necessary by the statutory language of 18 U.S.C. § 2252(2)(A) and (a)(4)(B)(i), which criminalize the possession of material depicting "the use of a minor *engaging in* sexually explicit conduct." *Id.* (emphasis added). Since "sexually explicit conduct" is defined to include "actual or simulated lascivious exhibition of the genitals or pubic area of any person," *id.* § 2256(2)(E), the government concludes that depictions "come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas." Gov't Sup. Ct. Brief (Sept. 1993) at 13.

In its brief after remand, the government recedes somewhat from the view implied by its Supreme Court brief that the depiction must show the child subject to have some lascivious intent. The government now argues only that the material must depict some conduct by the child subject, which includes a "lascivious exhibition of the genitals or pubic area," and which appeals to the lascivious interest of some potential audience. Although the government maintains that we did not address this aspect of the statute, and that a complete statutory interpretation should include this element, it argues that "the tapes in this case easily meet that requirement of the statute." Gov't Brief (March 1994) at 15.

The government is correct that in our prior opinion we did not specifically address this aspect of the statute.

We did not do so because neither Knox nor the government presented for review or argued this aspect of the statute as something the court needed to address in order to decide the case. Upon consideration of the meaning of this statutory language, we reject any contention, whether implied by the government or not, that the child subject must be shown to have engaged in sexually explicit conduct with a lascivious intent.

In *United States v. Wiegand*, 812 F.2d 1239, 1244-45 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S. Ct. 164 (1987), the Court of Appeals for the Ninth Circuit addressed this very question The court stated:

> In the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles. . . . The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by [§ 2256(2)(E)] is a picture of a child's sex organs displayed lasciviously – that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.

Id. at 1244. *See also United States v. Cross*, 928 F.2d 1030, 1042-43 n.34 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 594 (1991), and ___ U.S. ___, 112 S. Ct. 941 (1992); *Arvin*, 900 F.2d at 1389; Mr. A., 756 F. Supp. at 329; *United States v. McCormick*, 675 F. Supp. 223, 224 (M.D. Pa. 1987).

Children posing for pornographic pictures may suffer dramatic harm regardless of whether they have an "adult" look of sexual invitation or coyness on their face.

Therefore, we adhere to the view that "lasciviousness" is an inquiry that the finder of fact must make using the *Dost* factors and any other relevant factors given the particularities of the case, which does not involve an inquiry concerning the intent of the child subject. Our interpretation of the "lasciviousness" element is consistent with the plain meaning of the statute and furthers Congress' intent in eradicating the pervasive harm children experience when subjected to posing for pornographic purposes.

Thus, we conclude that a "lascivious exhibition of the genitals or pubic area" of a minor necessarily requires only that the material depict some "sexually explicit conduct" by the minor subject which appeals to the lascivious interest of the intended audience. Applying this standard in the present case, it is readily apparent that the tapes in evidence violate the statute. In several sequences, the minor subjects, clad only in very tight leotards, panties, or bathing suits, were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer. In some of these poses, the child subject was shown dancing or gyrating in a fashion indicative of adult sexual relations. Nearly all of these scenes were shot in an outdoor playground or park setting where children are normally found. Although none of these factors is alone dispositive, the totality of these factors lead us to conclude that the minor subjects were engaged in conduct – namely, the exhibition of their genitals or pubic area – which would appeal to the lascivious interest of an audience of pedophiles.

Since the statutory language does not suggest that a nude exhibition is necessary, Knox bears the burden of demonstrating a clear contrary congressional intent to warrant importing into the statute an unexpressed requirement of nudity. *See Malloy*, 860 F.2d at 1183. In our prior opinion, we reviewed the legislative history and concluded that it supported our interpretation of the statutory language. *See United States v. Knox*, 977 F.2d 815, 820-21 (3d Cir. 1992), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993). After further examining the relevant legislative history, however, we conclude that it is wholly silent as to whether Congress intended the statutory term "lascivious exhibition of the genitals or pubic area" to encompass non-nude depictions of these body parts.

The legislative proposal before the original child pornography statute enacted in 1977 would have proscribed "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2nd Sess. (1977). Since Congress considered including nudity as an element of a criminal depiction, we continue to believe that the decision to eliminate this requirement must be deemed intentional. Thus, when Congress passed the 1977 Act prohibiting a "lewd exhibition of the genitals or pubic area of any person," it may have desired to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd.[12] Clearly, Congress

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[12] A subsequent amendment, the Child Protection Act of 1984, replaced "lewd" with the word "lascivious," but the two words have nearly identical meanings. *United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164 (1987).

could have expressly limited the statute's scope to encompass only naked displays by prohibiting the "lascivious exhibition of the *nude* genitals or pubic area of any person." But this is not the language Congress included in the statute.[13]

Appellant Knox and the government, however, rely on a letter from the Justice Department outlining its views concerning S. 1001, the original proposed bill (containing the nudity language), as evidence that Congress assumed that an exhibition meant a nude, or as the government contends at least a discernible, exhibition of the genitals or pubic area. *See Protection of Children Against Sexual Exploitation: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Comm. of the Judiciary*, 95th Cong., 1st Sess. 77-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 63 (letter from Patricia M. Wald, Assistant Attorney General to James O. Eastland, Chairman, Committee of the Judiciary). After suggesting that "lewd exhibition of the genitals" replace the proposed nudity language, the Assistant Attorney General stated, "Congress could make clear in the legislative history of the bill

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[13] Furthermore, Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals, or only depictions in which the minor subject's genitals or pubic area are discernible or at least somewhat visible. *See* H.R. Rep. No. 99-910, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952-59; S. Rep. No. 98-169 (98th Cong. 2nd Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 492; H.R. Rep. No. 98-536, 98th Cong., 2nd Sess. (1983); S. Rep. No. 95-438, 95th Cong. 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40-68; H.R. Rep. No. 95-696, 95th Cong., 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 69-71; H.R. Conf. Rep. 99-910, 99th Cong. 2nd Sess. (1977).

what types of nude portrayals of children were intended to be encompassed within this definition." *Id.* Upon reexamination, we believe there are two plausible interpretations of this letter and, thus, we conclude that it is not helpful in determining Congress' intent.

Under the first interpretation, which we adopted in our prior opinion, the Wald letter assumes that Congress only desired to prohibit nude exhibitions because at that time the language of the proposed bill included the word "nudity." By subsequently eliminating the word "nudity," Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude exhibitions. Alternatively, it is arguably significant that the language suggesting that Congress clarify what types of nude portrayals would be prohibited was contained in the very letter recommending the substitution of the phrase "lewd exhibition of the genitals" for the original nudity language. *Protection of Children, supra,* 95th Cong., 1st Sess. 77-78. In light of this legislative history, Knox and the government submit that Congress omitted any reference to nudity in the statute by replacing it with the phrase "lewd exhibition of the genitals or pubic area," which does not encompass any depiction of completely clothed, or non-discernible, genitals or pubic area.

Because we find both interpretations of this letter plausible, and the legislative history *in toto* to be silent as to whether Congress intended the statute to reach non-nude depictions, we do not rely on it in adhering to our

prior statutory interpretation.[14] We conclude that Knox has not met his burden of proving that Congress intended

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[14] Nor do we reply on the legislative pronouncements concerning this statute and case recently passed by both houses of Congress. On November 4, 1993, the Senate unanimously adopted an amendment to an unrelated bill confirming "the intent of Congress" that 18 U.S.C. § 2256(2)(E) "is not limited to nude exhibitions or exhibitions in which the outlines of those areas [are] discernible through clothing." 139 Cong. Rec. S14,976 (Daily ed., Nov. 4, 1993). Subsequently on April 20, 1994, the House of Representatives passed by a vote of 425-3 a similar nonbinding resolution expressing the sense of Congress that "the Department of Justice has used its brief in the Knox case as a vehicle for reinterpretation of the child pornography laws in contravention to legislative history," and that "Congress specifically repudiated a nudity requirement for child pornography statutes." 140 Cong. Rec. H2536 (Daily ed. Apr. 20, 1994).

These resolutions are post-enactment legislative history which should be given little, if any, weight because they do not necessarily reflect the intent of the members of Congress who originally enacted the statutory language. As Justice Scalia stated concerning subsequent legislative history:

> "Subsequent legislative history" – which presumably means the post-enactment history of a statute's consideration and enactment – is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expressions *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means.
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> . . .
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> Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

Sullivan v. Finkelstein, 496 U.S. 617, 631-32, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part).

the statute to reach only a nude "lascivious exhibition of the genitals or pubic area." Thus, we will not read a nudity requirement into a statute that has none.

The underlying rationale for the federal child pornography laws also supports the conclusion that clothed exhibitions of the genitalia are proscribed. When an obscenity statute is challenged as unconstitutional under the First Amendment, the Supreme Court balances the government's interest in protecting the sensibilities of unwilling recipients from exposure to pornography against the dangers of government censorship. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). Because the government interest, although legitimate, is not compelling, regulation of obscene materials is limited to works which "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S. Ct. at 2615.

The Supreme Court allows the states and Congress greater leeway to regulate and proscribe pornography that depicts minors as distinguished from adults since the harmful effects suffered by a child are palpably more

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The language of the child pornography statute at issue in this case was enacted in 1977, and amended in 1984. Since that time there has been such a large turnover in Congress that a majority of the legislators who voted for the recent legislative pronouncements had no role in the passage of the original statute. Thus, we do not consider the subsequent legislative history as providing any indication that the enacting Congress intended the scope of the child pornography statute to cover non-nude depictions.

severe. *New York v. Ferber*, 458 U.S. 747, 756-61, 102 S. Ct. 3348, 3354-57 (1982). The Court relaxes the *Miller* obscenity test when pornographic material portrays minors since the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Id.* at 756-57, 102 S. Ct. at 3354 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S. Ct. 2613, 2620 (1982)). The use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. *Id.* at 757, 102 S. Ct. at 3355; *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S. Ct. 1691, 1696 (1990). The psychological effect of visually recording the sexual exploitation of a child is devastating and its elimination is of "surpassing importance." *Ferber*, 458 U.S. at 757, 102 S. Ct. at 3355. Since the child's image is permanently recorded, the pornography may haunt him or her for a lifetime because the child will be aware that the offensive photograph or film is circulating through the masses. *Id.* at 759 n.10, 102 S. Ct. at 3355 n.10 (quoting Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). The crime is the affront to the dignity and privacy of the child and the exploitation of the child's vulnerability:

> Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.

United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S. Ct. 164 (1987). Additionally, controlling the production and dissemination of child pornography is of paramount importance since pedophiles often use child pornography to seduce other children into performing sexual acts. *Osborne*, 495 U.S. at 111, 110 S. Ct. at 1697.

To vindicate the compelling government interest in protecting the safety and welfare of children, not only is the spectrum of constitutionally unprotected pornographic material broader when the subjects are children rather than adults, but also the arsenal of available enforcement mechanisms is more extensive. For instance, the mere possession of child pornography, even in one's home may be criminalized although only distribution of obscenity depicting adults can be proscribed. *Compare Stanley v. Georgia*, 394 U.S. 557, 568, 89 S. Ct. 1243, 1249 (1969) (Georgia statute outlawing private possession of obscenity violates the First Amendment) *with Osborne*, 495 U.S. at 108, 110 S. Ct. at 1694-97 (Ohio statute criminalizing possession of child pornography upheld against First Amendment challenge due to the compelling interest in protecting minors).

The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles. The child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude

portrayal. The rationale underlying the statute's proscription applies equally to *any lascivious* exhibition of the genitals or pubic area whether these areas are clad or completely exposed.

Knox next asserts that our decision in *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989), mandates that the genitals or pubic area be exposed before an exhibition may occur. In *Villard*, we stated that "more than merely nudity" was required for a violation of the statute; otherwise, "inclusion of the term 'lascivious' would be meaningless." *Id.* at 121. The requirement of more than mere nudity does not mean, as Knox contends, that nudity is a prerequisite to the existence of an exhibition; rather, *Villard* simply stated the obvious principle that nudity alone is insufficient to constitute a *lascivious* exhibition. No one seriously could think that a Renoir painting of a nude woman or an innocuous family snapshot of a naked child in the bathtub violates the child pornography laws. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute. Such was our holding in *Villard*, which addressed whether sufficient evidence existed to justify a finding of lasciviousness.

In our prior opinion we went on to sate that our holding in *Villard* provides support for our conclusion that a "lascivious exhibition" includes non-nude depictions of a minor's genitals or pubic area. *See Knox*, 977 F.2d at 822-23. We came to that conclusion because inclusion of the fourth *Dost* factor, "whether the child is fully or partially clothed, as

implicit assumption that a clothed exhibition of the genitals is criminalized under the statute." *Id.* at 823. Knox argues that our reliance on this authority was misplaced because the determination of whether a certain depiction visually displays the minor subject's genitals or pubic area is a threshold inquiry required by the language of the statute itself, whereas consideration of the *Dost* factors is relevant only for the later determination of whether that depiction is lascivious. *See United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir.), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 672 (1991). Knox further contends that it is possible for a minor subject to be *fully clothed* and still exhibit his or her fully exposed genitals – e.g., a well directed side-angle camera shot could reveal the genitals through an opening in the subject's shorts or skirt.

Upon further consideration, we agree with Knox and the *Arvin* court that the question whether the depiction at issue visually exhibits the genitals or pubic area is a threshold determination not necessarily guided by the *Dost* factors. However, we do not agree that the *Dost* factors are completely irrelevant to this threshold determination. For instance, the first *Dost* factor, "whether the focal point of the visual depiction is on the child's genitalia or pubic area," 636 F. Supp. at 832, may play an important role in the determination of whether the child subject's genitalia or pubic area are on exhibit within the meaning of the statute. Nevertheless, although the fourth *Dost* factor arguably provides no support for our interpretation of the statute as reaching lascivious depictions of a child's fully covered genitals or pubic area, it is clearly not inconsistent with that interpretation.

After giving further consideration to the language of the statute, its legislative history, the underlying rationale for the federal child pornography laws, and the brief of Solicitor General submitted on behalf of the United States, we hold that the statutory term "lascivious exhibition of the genitals or pubic area," as used in 18 U.S.C. § 2256(2)(E), does not contain any requirement that the child subject's genitals or pubic area by fully or partially exposed or discernible through his or her opaque clothing. The statutory language is clear and contains no ambiguity. Therefore, the rule of lenity should not be applied to defeat the clear intent of Congress to prohibit the possession of child pornography to the maximum extent allowable under the Constitution. *See, e.g., National Org. for Women, Inc. v. Scheidler*, ___ U.S. ___, ___, 114 S. Ct. 798, 806 (1994) ("the rule of lenity applies only when an ambiguity is present; 'it is not used to beget one' " (quoting *United States v. Turkette*, 452 U.S. 576, 587-88 N.10, 101 S. Ct. 2524, 2531 n.10 (1981)); *Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2084, 2089 (1985) ("the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress"); *United States v. Bramblett*, 348 U.S. 503, 509-10, 75 S. Ct. 504, 508 (1955).[15]

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[15] Knox contends that because his prosecution and conviction for violating the federal child pornography laws was the first involving materials which contain absolutely no nudity, the rule of lenity must be applied. At the outset, we repeat that the rule of lenity does not apply in this case because the statutory language contains no ambiguity. We also reject this contention because it misconceives the object of the rule of lenity and would produce an absurd result. First, the application of the rule of lenity is not dependent whatsoever on whether there

V.

Interpreting an "exhibition of the genital or pubic area" to include a clothed display of these areas does not render the statute unconstitutionally overbroad.[16] The function of the First Amendment overbredth doctrine is to prevent broadly worded statutes which control constitutionally unprotected conduct from deterring constitutionally protected expression. Invalidating a statute as overbroad, however, is an exceptional remedy and should be employed sparingly and only as a last resort since it is "strong medicine." *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973). Before a child pornography statute is declared unconstitutional, the overbreadth

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have been successful prosecutions under the statute at issue. *Cf., e.g., Ratzlaf v. United States,* ___ U.S. ___, ___, 114 S. Ct. 655, 662-63 (1994) (Court applied the rule of lenity because of an ambiguity in the statute, even though there had been many previous successful prosecutions under the statute). The rule of lenity " ' comes into operation at the end of the process of construing what Congress had expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Russsello v. United States,* 464 U.S. 16, 29, 104 S. Ct. 296, 303 (1983) (quoting *Callanan v. United States,* 364 U.S. 587, 596, 81 S. Ct. 321, 326 (1961)); *see also United States v. Pollen,* 978 F.2d 78, 85 (3d Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S. Ct. 2332 (1993). Second, if we were to agree with Knox's argument, then the government would never be able to successfully prosecute a person for violating a newly enacted criminal statute, nor would the government be able to successfully proceed under a theory different from that which has yielded convictions in the past.

[16] The term "pubic area" cannot be challenged as vague or overbroad since Knox contends, and we agree, that this phrase describes a precise anatomical region.

must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S. Ct. at 2918. The requirement of substantial overbreadth is equally applicable to challenges that arise in defense of a criminal prosecution. *Ferber*, 458 U.S. at 772-74, 102 S. Ct. at 3363.

In *Ferber*, the Supreme Court held that the New York statute which criminalized the "lewd exhibition of the genitals" was not constitutionally overbroad. *Id.* Although some protected expression, ranging from medical textbooks to National Geographic photographs, could possibly be reached by the statute, this tiny fraction of materials within the statute's coverage could be protected by case-by-case analysis. *Id.* Furthermore, the Supreme Court has repeatedly emphasized that the constitutional rights of adults to obtain, possess, or use sexually explicit material may be limited in order to protect children from exposure to these materials and form sexual exploitation. *See Ginsberg v. New York*, 390 U.S. 629, 634-43, 88 S. Ct. 1274, 1277-82 (1968) (the right to publish and distribute non-obscene material may be limited by banning its sale to minors); *Ferber*, 458 U.S. at 756, 102 S. Ct. at 3345 ("States are entitled to greater leeway in the regulation of pornographic depictions of children" than in protecting against obscenity).

Knox's prediction that our interpretation of an exhibition will result in prosecutors leafing through family albums and church bulletins containing innocent pictures of fully clothed children and pressing charges is unfounded. The limiting principle in the statute is the

requirement of lasciviousness.[17] A visual depiction of a child subject's genital or pubic area, whether the child is clothed or naked, must be lascivious in order to be proscribed. Whether a depiction is lascivious is essentially an inquiry into whether or not the material meets the standard of lasciviousness as guided by the *Dost* factors. *Villard*, 885 F.2d at 122; *see supra* note 10. Only a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious. Even fewer images where a minor's genital area is not fully exposed will constitute lascivious exhibitions since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness. Thus, including scantily clothed displays of the genitals within the meaning of an exhibition leaves the statute "directed at the hard core of child pornography," *Ferber*, 458 U.S. at 773, 102 S. Ct. at 3363, which results in leaving an indelible psychological scar on the exploited child. Our interpretation simply declines to create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered.

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[17] The issue is not raised in this case, but we note that although the meaning of lasciviousness is far from crystal clear, it is not unconstitutionally vague or overbroad. *See United States v. O'Malley*, 854 F.2d 1085, 1086-87 (9th Cir. 1988); *Wiegand*, 812 F.2d at 1243.

VI.

On remand, Knox again contends that insufficient evidence was presented at trial for a trier of fact to have found, beyond a reasonable doubt, that (1) the Nather tapes traveled through the mail in interstate commerce; and (2) Knox "knowingly" possessed three pornographic videotapes. Generally, this court must examine the evidence as a whole in the light most favorable to the government, and must sustain a conviction if there is substantial evidence to support it. *United States v. Carr*, No. 93-1796, 1994 WL 237007, at *4-5 (3d Cir. June 3, 1994). When we previously rejected Knox's arguments on this point, we noted that Knox had not timely filed his post-trial motion for acquittal, and thus indicated that the sufficiency of evidence issues might be reviewed only for plain error. *Knox*, 977 F.2d at 824. Nevertheless, we concluded that we did not need to determine whether "the plain error test and the sufficiency of evidence standard are essentially equivalent inquiries" because the government fulfilled the more stringent standard of establishing that the evidence was sufficient "to support the district court's finding that the Nather tapes traveled through the mail and that Knox knowingly received and possessed those films." *Id.*

In its brief submitted to the Supreme Court, the government indicated that we were mistaken in reviewing the evidence only for plain error. Gov't Sup. Ct. Brief (Sept. 1993) at 21-22 n.10. We acknowledge that the analysis following our introductory paragraph quoted above was somewhat unclear as to whether we were applying the plain error or sufficiency of evidence test. We now clarify the conclusion expressed in our prior opinion that

the government did indeed introduce sufficient evidence for the district court to conclude beyond a reasonable doubt that Knox knowingly received the Nather films and that those films traveled through the mail.

To establish interstate mailing, the government introduced evidence that Knox rented a mailbox under a fictitious name and that he received other pornographic materials at that mailbox. When agents searched Knox's apartment pursuant to a valid search warrant, they discovered advertisements from Nather with checkmarks next to several videotapes and envelopes, pre-addressed to Nather, with forms to order Nather tapes. One of the videos marked in the catalogue was included as a segment of a compilation tape found in Knox's apartment. A carbon copy of a $62 money order payable to Nather was also seized from Knox's apartment. Sixty-two dollars is the approximate price of a single Nather tape. Knox is correct that the government never introduced direct evidence that Nather mailed tapes to Knox's rented mailbox. A trier of fact, however, may consider direct and circumstantial evidence and the reasonable inferences to be drawn therefrom.

The above facts provide strong circumstantial support that Nather, a Nevada mail order video company without any offices in Pennsylvania, at some point utilized the postal system to cause the tapes it distributes to be discovered in Knox's apartment in Pennsylvania. *Cf. Turner v. United States*, 396 U.S. 398, 415-17, 90 S. Ct. 642, 652-53 (1970) (although some heroin is produced in this country, the vast majority of heroin is produced abroad; thus, jury could permissibly infer, beyond a reasonable doubt, that defendant possessed a smuggled drug). The

circumstantial evidence was sufficient for the district court to conclude beyond a reasonable doubt that the Nather films traveled through the interstate mails.

The record also contains sufficient evidence for the district court to conclude beyond a reasonable doubt that Knox "knowingly" received and possessed the Nather tapes. Knox maintains that the absence of nudity in the films and the disclaimers in the Nather brochures that the videos were legal to purchase and own disproves the mens rea element of § 2252. We have previously held that the mens rea requirement of § 2252 "does not require that a recipient of child pornography know the precise contents of such materials." *United States v. Brown*, 862 F.2d 1033, 1036 (3d Cir. 1988). In *Brown*, the defendant ordered one film, but accidentally received a different tape. Since the defendant knew the video he requested was child pornography, we deemed it irrelevant that he did not know the exact contents of the substituted tape actually mailed to him.

Knox's argument in this case is somewhat different. He claims that although he knew the contents of the Nather tapes, he was unaware that the videos were child pornography and believed they were legal to own. To address this contention, we look to the Supreme Court's interpretation of a strikingly similar statute for guidance. To fulfill the "knowingly" requirement of 18 U.S.C. § 1461 (the obscenity law concerning adults),[18] the Supreme

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[18] Title 18 U.S.C. § 1461 provides in pertinent part: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . . "

Court held that the prosecution need only show that the defendant had knowledge of the contents, character, and nature of the materials. *Hamling v. United States*, 418 U.S. 87, 123, 94 S. Ct. 2887, 2910 (1974). To require proof that the defendant knew the materials were obscene, and thus illegal to distribute, would allow defendants to avoid prosecution by claiming ignorance of the relevant law. *Id.* It would be ironic to construe the same word, "knowingly," in the analogous child pornography law as more lenient to criminal defendants since the purpose for enacting the child pornography statute was to create more stringent regulation for child pornography than already existed through the generally applicable obscenity laws. Therefore, to fulfill the knowledge element of § 2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal. *See United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) (no need to prove knowledge of illegality under § 2252); *United States v. Tolczeki*, 614 F. Supp. 1424, 1429 (N.D. Ohio 1985) (same). The child pornography laws would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law.

There is no doubt that Knox was aware of the nature of the Nather tapes when he received them. Newsletters from Nather found in Knox's apartment described the contents of the films – "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy . . . so revealing it's almost like seeing them naked" – and the video's intended effects – "Sassy Sylphs will blow your mind so completely you'll be begging for mercy." Knox

handwrote his own descriptions of the Nather films on the outside of the boxes. For instance, on the Nather II tape, Knox wrote "13-year old flashes" followed by "hot." Knox characterizes the second vignette as "15 year old shows nipple." Both Nather's and Knox's descriptions of the tapes clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. Sufficient evidence was presented at the bench trial to support a finding that Knox was aware of the nature of the Nather tapes, and therefore knowingly possessed and received them.

Even if a reasonable mistake as to the legality of the material was recognized as a defense, the language of the statute is clear that nudity is not a prerequisite for a lascivious exhibition. Additionally, relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advise as to whether the material he earns a living by selling is legal. Nather's disclaimer could not reasonably lead Knox to believe that the videotapes were legal. If anything, the need to profess legality should have alerted Knox to the films' dubious legality.

VII.

In sum, after further consideration of the statutory language, legislative history, the purpose of Congress in passing the federal child pornography statute, and the Solicitor General's brief submitted in the Supreme Court, we hold that a "lascivious exhibition of the genital or pubic area" pursuant to 18 U.S.C. § 2256(2)(E) encompasses visual depictions of a child's genitals or pubic area

even when these areas are covered by an article of clothing and are not discernible. Our interpretation of the statutory language does not render the statute unconstitutionally overbroad since the requirement of lasciviousness limits the proscribed depictions to constitutionally unprotected expression. Finally, there was sufficient record evidence for the district court to conclude beyond a reasonable doubt that Knox knowingly received and possessed the videotapes and that the films traveled through interstate mail. The judgment of conviction will therefore be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit